UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2000/NGO/16
20 January 2000

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-sixth session
Item 15 of the provisional agenda

INDIGENOUS ISSUES

Written statement submitted by the South Asia Human Rights Documentation Centre, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 December 1999]

GE.00-10336 (E)

Inaccuracies in the study on treaties, agreements and other constructive arrangements between States and indigenous populations

1. Treaties, agreements and other constructive arrangements with States are immensely important for indigenous peoples all over the world. South Asia Human Rights Documentation Centre (SAHRDC) welcomes the final report (E/CN.4/Sub.2/1999/20) of Mr. Miguel Alfonso Martinez, Special Rapporteur on the "study on treaties, agreements and other constructive arrangements between States and indigenous populations".

2. However, SAHRDC has been concerned about some factual inaccuracies in the report of the Special Rapporteur. In this regard, SAHRDC welcomes resolution 1999/22 on the Promotion and Protection of Human Rights on this subject. The Sub-Commission took note of the critical remarks and observations advanced by a number of organizations and individuals participating in the debates on the Special Rapporteur's conclusions, contained in paragraphs 67 to 92 of the final report, on the relevance of the concept of indigenousness, in the particular context of present-day African, Asian and Pacific States, and requested the Special Rapporteur "to submit to the secretariat, not later than 15 November 1999, the corrections and additions" he considers "necessary to make to the English, Spanish and French versions" of the final report.

3. In paragraph 80 of the report, the Special Rapporteur states that he "has not been in a position to assess all possible overlaps and contradictions of every treaty-related issue and the overall indigenous problematique in the African and Asian contexts". Yet, the Special Rapporteur refers to "cases and situations in which the 'indigenous peoples' category is already established beyond any doubt from a historical and modern day point of view". This observation of the Special Rapporteur is contradictory. The Special Rapporteur also does not elaborate upon the yardsticks he applied in identifying "cases and situations in which the 'indigenous peoples' category is already established beyond any doubt from a historical and modern day point of view".

4. When Governments recognize the presence of indigenous peoples in their countries, it must be concluded that these are cases and situations "beyond any doubt from a historical and modern day point of view". Many countries in Asia recognize the existence of indigenous peoples.

5. In 1997, the Government of the Philippines adopted the Indigenous Peoples Act of 1997. The Government of Malaysia has a specific law, entitled "Aboriginal Peoples Act" of 1967, which recognizes the existence of indigenous peoples. Under article 161 (A) of the Federal Constitution of Malaysia, the peoples of Sabah and Sarawak are recognized as "natives" or indigenous. The Government of Nepal recognizes indigenous peoples in the country and formed a National Committee for the International Year of the World's Indigenous Peoples, 1993 and a National Committee for the United Nations Decade for the World's Indigenous People, 1994-2004. The courts in Japan have recognized the indigenousness of the Ainu. The same was reiterated by the Japanese Parliament in a supplementary resolution to the Act for the Promotion of Ainu Culture, Spread of Knowledge relevant to Ainu Traditions and an Educational Campaign of May 1997. The Government of Bangladesh recognizes indigenous peoples through various legislation like the Chittagong Hill Tracts 1900 Regulation (Act 1 of 1900), Act No. 12 of 1995,

and through correspondence of the Bangladesh National Board of Revenue of 10 March 1980, 9 April 1980, 17 October 1992 and 12 June 1995. The Government of Bangladesh informed the Special Rapporteur on the Study of the Problem of Discrimination against Indigenous Populations (see E/CN.4 /Sub.2/1986/ 7/Add.1), Mr. J. Martinez Cobo, that members of tribal or semi-tribal populations are regarded as indigenous "on account of their descent from the populations which are settled in specified geographical areas of the country". The Prime Minister of Bangladesh, Ms. Sheikh Hasina Wazed, in addressing The Hague Appeal for Peace, the governmental conference commemorating the centennial of the First Hague Peace Conference on 15 May 1999 stated that "the problem of the Chittagong Hill Tracts boils down to the right of an indigenous people". And the constitutionally mandated Scheduled Areas and Scheduled Tribes Commission of India clearly stated in its report of 14 October 1961, much before United Nations started its debate on indigenous peoples, that the Scheduled Tribes are the original inhabitants and internationally they are known as "indigenous" peoples.

6. The Asian Indigenous and Tribal Peoples Network (AITPN) and other indigenous organizations from Asia provided documentary evidence to the Special Rapporteur about the existence of indigenous peoples in the region after the draft final report was submitted during the sixteenth session of the Working Group on Indigenous Populations. Yet, the Special Rapporteur made no changes in the final report. This, despite the fact that the Special Rapporteur, in paragraph 25 of the final report, stated that he "will highly welcome all critical opinions" and that "these contributions will be duly taken into account for potential utilization as additional elements of judgement to be incorporated in the final report before it becomes an official United Nations publication".

7. SAHRDC notes the assertion made in the final report that "The Special Rapporteur is fully aware that he - and only he - is ultimately responsible for the content of the conclusions and recommendations of the present study" (para. 23). This observation raises two specific quandaries. First, once the report on the study on treaties, agreements and other constructive arrangements is adopted by the United Nations Commission on Human Rights, the ownership of the report will be vested in the United Nations. It will legally become an official United Nations publication. It will NOT be considered as a study conducted by an expert in his/her individual capacity. It will be rightly considered as a study of the United Nations. It will be referred to as such and its legal validity and credibility will be completely different from a study conducted by an individual expert in his/her personal capacity. Second, it is the prerogative of any Special Rapporteur to include the critical opinions or observations he/she deems appropriate. However, the Special Rapporteur's prerogative does not include the right to present a factually incorrect report. Facts are sacred while comment is free.

8. SAHRDC is also concerned about the Special Rapporteur's selective approach to colonialism in identifying indigenous peoples. In paragraph 73, the Rapporteur makes a clear distinction "between the phenomena of the territorial expansion by indigenous nations into adjacent areas, and that of the organized colonization, by European powers, of people inhabiting, since time immemorial, territories on other continents".

9. No international law makes any distinction between "territorial expansion into adjacent areas and organized colonization by European States". Article 1 of the United Nations

Declaration on the Granting of Independence to Colonial Countries and Peoples refers to "alien subjugation, domination and exploitation". After the recent referendum in East Timor, the only case which is pending before the United Nations Decolonization Committee is Western Sahara.

10. The recognition of indigenous peoples by countries like Malaysia, a former colony of Great Britain, puts to rest any doubts over "indigenousness" in the post-decolonization period.

11. In paragraph 90, the Special Rapporteur states, "the Special Rapporteur firmly maintains his view that the situations described above, the scenario of which is African or Asian States, should be analysed in other forums of the United Nations than those that are currently concerned with the problems of indigenous peoples, in particular the Working Group on Minorities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities".

12. The observation of the Special Rapporteur that certain peoples qualify "only" as minorities and not as indigenous only adds to the confusion that exists on the fallacious relationship between indigenous peoples and minorities contrary to the practices of the national institutions on minorities and United Nations treaty bodies. "Minority" automatically implies a numerical population whether it is national, ethnic, religious or linguistic.

13. The United Nations Human Rights Committee admitted complaints filed by the indigenous peoples alleging violation of rights under article 27 of the International Covenant on Civil and Political Rights. The judgements of the Human Rights Committee in the case of Sandra Lovelace v. Canada and Ivan Kitok v. Sweden in no way made the Maliseets Indians in Canada and the Samis in Sweden minorities in the sense that they could no longer be considered as indigenous peoples. Moreover, indigenous peoples are not a homogenous category of people themselves. They have different religions, languages and customs. In many States, like Bolivia and Guatemala, indigenous peoples form the numerical majority of the population.

14. It would be unfortunate if the United Nations Commission on Human Rights adopts a report which contains gross factual inaccuracies. If the Special Rapporteur fails to reflect the realities of Asia pursuant to the Sub-Commission resolution, the Commission on Human Rights should extend the mandate of the Special Rapporteur by another year, requesting the Special Rapporteur to include the evidence provided by the indigenous peoples from Asia in his study.